IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| TIMOTHY BOOTH | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| LEON KING ET AL. | : | NO. 03-802 |

MEMORANDUM

Dalzell, J. February 3, 2006

Timothy Booth is a convicted felon recently released from prison and representing himself in this case. He claims that when he was in the custody of the Philadelphia Prison System ("PPS") at its House of Corrections ("HOC"), nine officials punished him for exercising his First Amendment rights. He also claims that these officials unfairly searched his cell, confiscated various items, fabricated a misconduct charge, and placed him in disciplinary segregation -- all to punish him for filing grievances at another institution and a single grievance at HOC.

This is the sixth civil rights action Booth has filed in this district.[1] Because this case cannot survive summary judgment, we today bring this chapter to a close.

[1] A search in our electronic case filing system for cases involving Timothy Booth reveals that he filed six civil rights cases in this district: (1) Timothy Booth v. C. O. Pence et al., Civ. No. 01-4296 (E.D. Pa. 2001); (2) Timothy Booth v. Donald T. Vaughn et al., Civ. No. 02-1072 (E.D. Pa. 2002); (3) Timothy Booth v. Loreno et al., Civ. No. 02-6752 (E.D. Pa. 2002); (4) Timothy Booth v. Leon King, Civ. No. 03-802 (E.D. Pa. 2003); (5) Timothy Booth v. PA Parole Board et al., Civ. No. 03-5646 (E.D. Pa. 2003); and (6) Timothy Booth v. Captain Lowell et al., 03-6514 (E.D. Pa. 2003).

## I. Factual Background[2]

From August 16, 2002 to January 2, 2003, Booth, a convicted burglar, was at PPS's Curran Fromhold Correctional Facility ("CFCF"). Pl.'s Dep., at 9, 28; Def.s' First Mot. for Summ. Judg. ("Def.s' MSJ 1"), Ex. D. During this time at that jail, Booth filed many grievances. Pl.'s Dep., at 14, 30-32, 37. In late December of 2002, Booth wrote a letter to Leon King, CFCF's Commissioner, and threatened to file a civil lawsuit if CFCF failed to address all of his grievances by January 21, 2003. Pl.'s Resp. to Renewed Second Motion for Summ. Judg. ("Pl.'s Resp."), Ex. 13; Pl.'s Dep., at 22, 25-26, 39.

On January 2, 2003, at Booth's request PPS transferred him from CFCF to HOC. Def.s' MSJ 1, Ex. D & Ex. G, at 6, 15. Four days later Booth filed a grievance with Rodney Brockenbrough, who was then one of HOC's deputy wardens, reiterating the January 21, 2003 deadline he gave to Commissioner King and again threatening to file a civil lawsuit. Def.s' Renewed Second Mot. for Summ. Judg. ("Def.s' MSJ 2"), Ex. O ¶ 2; Pl.'s Dep., at 22, 50, 63; Pl.'s Resp., Ex. 15.

On January 13, 2003, Sergeant Phyllis Harris ordered correctional officers Sandra Morrison and Terrence Worsley to conduct a routine search of the cells on Booth's block. Def.s' MSJ 2, Ex. L ¶ 4. Upon reaching Booth's cell, Morrison and Worsley began searching it. Pl.'s Dep., at 14-15, 20-21. A

[2] As this is a motion for summary judgment, we present these facts in the light most favorable to Booth.

dispute erupted between Booth and the guards, with Harris ultimately telling Booth to "shut the hell up." Pl.'s Dep., at 49. Toward the end of this exchange, Morrison later reported, Booth tried to enter the cell, became hostile and aggressive, and warned her to "watch [her] back." Def.s' MSJ 2, Ex. E.

In the wake of this unpleasantness, Harris, Morrison, Worsley, and two other officials -- Sergeant Michael Terry and Lieutenant Warren Stolle -- confiscated Booth's legal documents, as well as an Islamic prayer book, kufi,[3] and prayer rug. Pl.s Dep. at 14-15, 21-25, 48, 52. While some legal documents were later returned to Booth, he never received all of them,[4] and it is unclear whether he got back the religious items.[5] Compare id.

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[3] A kufi is a "close-fitting brimless cylindrical or round hat." Merriam-Webster's Collegiate Dictionary 693 (11th ed. 2005). After searching (unsuccessfully) for a more thorough definition in the Oxford English Dictionary, Webster's Third New International Dictionary, the Random House Dictionary of the English Language, and Encyclopedia Britannica, we found one online that not only is more thorough, but also more apt: "A kufi is a short rounded cap, traditionally worn by persons of African decent [sic] to show pride in their heritage and muslim religion." See Wikipedia, the Free Encyclopedia, at http://en.wikipedia.org/wiki/Kufi (last visited February 1, 2006). Veterans of litigation in this district need not consult these definitions. See St. Clair v. Cuyler, 481 F. Supp. 732 (E.D. Pa. 1979) (Jos. S. Lord, J.) (holding that it infringed a prisoner's First Amendment rights to require him to remove a kufi while dining or facing a parole board), rev'd, 634 F.2d 109 (3d Cir. 1980), reh'g denied, 643 F.2d 103 (3d Cir. 1980).

[4] Both also claims that, after the incident, he saw Officer Terry examine some of the legal documents. Id. at 16. Terry allegedly warned Booth that if Booth filed a lawsuit, Terry would kill him and "would blow my mother [sic] house the fuck up." Id. at 16.

[5] This being a summary judgment motion, we shall assume that Booth did not receive them.

at 14, 51, 22-24 with Def.s' MSJ 1, Ex. G.

Because of this run-in, on January 13, 2003, Morrison filed a misconduct report that Stolle ultimately served on Booth. Def.s' MSJ 1, Ex. E. The report charged Booth with disrespect, assault, disturbance, and refusal, and it said:

> Summary: THREATS OF BODILY HARM
>
> Narrative: ON [January 13, 2003] DURING A ROUTINE SHAKEDOWN OF [cellblock] F1 I C/O MORRISON AND OFFICER WORSELY WERE ASSIGNED TO CELL 924. BOTH INMATES WERE SEARCHED BY OFFICER WORSELY AND ORDERED TO STAND OUTSIDE OF THE CELL. UPON SEARCHING THE CELL A MEDICATION PASS BELONGING TO INMATE BOOTH APPEARED TO BE ALTERED. I C/O MORRISON INFORMED INMATE BOOTH THAT I WOULD RETURN THE PASS AFTER I SPOKE TO MEDICAL STAFF. AT THIS TIME HE BECAME HOSTILE AND AGGRESSIVE STATING I DON'T CARE. I'M A DIABETIC AND I HAVE ANOTHER PASS. OFFICER WORSELY AND MYSELF CONTINUED TO SEARCH THE CELL WHEN WE CAME TO INMATE BOOTHS [sic] AREA OF THE CELL AND OBSERVED A PLASTIC BAG CONTAINING SEVERAL CONTAINERS FILLED WITH CLEAR LIQUID. I BEGAN TO INSPECT THE CONTAINERS OF LIQUID WHEN INMATE BOOTH STATED SHE'S JUST IGNORANT. SHE NOT GONNA FIND NOTHING. AT THIS TIME I THEN BEGAN INSPECTING A PLASTIC BAG CONTAINING LEGAL MAIL. AS I BEGAN CHECKING THE ENVELOPES INMATE BOOTH STATED IN A VERY AGGRESSIVE MANNER, YOU BETTER PUT ALL MY LEGAL MAIL TOGETHER. AT THIS TIME I INFORMED INMATE BOOTH THAT A SHAKEDOWN WAS IN PROGRESS[.] AS I CONTINUED TO GO THROUGH THE MAIL INMATE BOOTH MADE AN ATTEMPT TO GAIN ENTRY INTO THE CELL. I ORDERED HIM TO STAND OUTSIDE THE CELL GATE. HE STEPPED BACK AND BECAME HOSTITE [sic] AND AGGRESSIVE TOWARDS ME. AFTER THE CELL SEARCH WAS COMPLETED BOTH INMATES WERE SECURED IN THE CELL. INMATE BOOTH THEN STATED YOU BETTER WATCH YOUR BACK.

Id. Morrison, Stolle, and Booth signed the report. After giving Booth the report, PPS transferred him to disciplinary segregation pending the outcome of the misconduct charges. Pl.'s Dep., at 14-15. Booth claims that the misconduct report was "fabricated." Id. at 14.

On January 17, 2003, Disciplinary Hearing Officer Captain Alice Young convened Booth's misconduct hearing. Def.s' MSJ 2, Ex. G & Ex. M ¶ 3. According to the hearing record, Booth was formally charged with two counts of "disrespecting any staff member" and one count of "assaulting any staff member (no contact)." Def.s' MSJ 2, Ex. G. Based on Lieutenant Stolle's pre-hearing investigation, Young concluded that "there were no witnesses to the incident" and therefore prohibited Booth from calling any, despite his request to do so. Def.s' MSJ 2, Ex. M ¶ 4; Pl.'s Dep., at 53-54. After hearing evidence, Young dismissed one disrespect count and found Booth guilty of the other, as well as of assault. Def.s' MSJ 2, Ex. G. Young sentenced Booth to fifteen days of disciplinary segregation; he served fourteen days. Pl.'s Dep., at 24; Def.s' MSJ 2, Ex. G. Acting Warden Charles Shovlin later upheld Captain Young's findings and punishment. Def.s' MSJ 2, Ex. M ¶ 5 & Ex. H ¶ 7.

## II. Procedural Posture

On March 24, 2003, Booth filed this pro se civil rights lawsuit against twenty defendants at CFCF and HOC. In his complaint, Booth claims (1) violations of his right of access to courts under the First and Fourteenth Amendments, (2) cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, (3) unreasonable seizure and deprivation of property without due process of law in violation of the Fourth and Fourteenth Amendments, (4) violations of substantive and

procedural due process rights under the Fourteenth Amendment, (5) discrimination on the basis of religion under the First Amendment, and (6) retaliation for filing complaints and grievances.

Until very recently, this case was assigned to the Honorable Anita B. Brody. On November 29, 2004, Judge Brody granted summary judgment to eleven defendants and dismissed all claims save retaliation. See Booth v. King, 346 F. Supp. 2d 751 (E.D. Pa. 2004). The gist of Booth's surviving retaliation claim is that, because he sent a demand letter to Commissioner King and Deputy Warden Brockenbrough, HOC guards retaliated by (1) searching his cell, (2) confiscating his property, (3) issuing a false misconduct report, and (4) putting him in disciplinary segregation. In her November 29, 2004 memorandum, Judge Brody held that Booth's retaliation claim should survive "[b]ecause Booth has provided wholly unrebutted evidence of causation in the form of suggestive temporal proximity. . . ." Id. at 763.

On December 5, 2005, Judge Brody recused. Before us is the nine remaining defendants' second motion for summary judgment. The record before us differs from what it was before Judge Brody. First, seven of the remaining defendants swear that, when Booth claims they retaliated against him, they did not know about his grievances to Commissioner King or Deputy Warden Brockenbrough. See Def.s' MSJ 2, Ex. F, Ex. H, Ex. I, Ex. J, Ex. K, Ex. L, & Ex. M. Second, three remaining defendants -- King, Brockenbrough, and Acting Warden Shovlin -- swear that they had

no involvement in any of the four alleged retaliatory acts. See id., Ex. H, Ex. N, & Ex. O.[6]

## III. Legal Analysis[7]

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[6] On January 11, 2006, Booth filed a "notice of non-disclosure." In it, he claims that defendants breached their discovery obligations. See Docket Entry No. 115. Specifically, Booth claims that "the defendants submitted a list of name [sic] of inmate on 7 Block and D Block mixed together [sic] also this list doesn't give the prison cell number. Doing this non full disclosure is against plaintiff [sic] discovery request because I need to know what cell these men were in so that I can pick the one's [sic] whom [sic] cell was close to mine." Id. at 1.

Booth's allegation is meritless. In our December 15, 2005 Order, we directed defendants, by December 23, 2005, to "SERVE on Booth the names (and just the names) of the inmates who were housed on Booth's cell block, see [July 19, 2005 Hearing Tr.,] at 8, and if Booth wants the last known address of up to six of these inmates, he must SERVE a request by December 30, 2005 or waive his right to do so." Dec. 15, 2005 Ord. ¶ 3 (second emphasis added). In this Order we followed Judge Brody, who, on July 19, 2005, imposed identical requirements.

In defendants' second motion for summary judgment, counsel avers that she satisfied her end of the bargain, providing Booth with a list of the names of inmates housed on his block, Def.s' Mem., at 7 n.2, yet Booth failed to take advantage of his opportunity to receive up to six of these inmates' addresses. Id. Defendants thus fulfilled their duty and Booth failed to assert his right.

[7] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In resolving a motion for summary judgment, the Court must draw all reasonable inferences in the nonmovant's favor, Bartnicki v. Vopper, 200 F.3d 109, 114 (3d Cir. 1999), and determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where, as here, the nonmoving party bears the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if admissible, would be insufficient to carry the nonmovant's burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the nonmoving party must go

For a prisoner to prevail on a retaliation claim, he must first prove that "the conduct which led to the alleged retaliation was constitutionally protected." Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001). The prisoner must then show that he suffered "adverse action" at the hands of prison officials. Id. To do this, he must demonstrate that the action "was sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights." Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000).

Once the prisoner has met these first two threshold tests, he must then show "a causal link between the exercise of his constitutional rights and the adverse action taken against him." Rauser, 241 F.3d at 333. To demonstrate this link, the prisoner must prove that his constitutionally protected conduct was "a substantial or motivating factor" in the decision to discipline him. Id. (citing Mount Healthy Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977)). If the prisoner carries this burden, the defendant must then "prove by a preponderance of the evidence that it would have taken the same disciplinary action even in the absence of the protected activity." Id. (citing Mount Healthy, 429 U.S. at 287). Because of the "deference" courts should afford prison officials -- whose daily job hazards need no rehearsal -- even if a prisoner shows causation, "the prison

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beyond its pleadings and designate specific facts by the use of affidavits, depositions, admissions or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

officials may still prevail by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest."[8] Id. at 334.

Here, defendants concede that Booth's letters to King and Brockenbrough -- which threatened lawsuits -- were constitutionally protected. Defendants also concede that a reasonable jury could find that the actions Booth attacks -- to wit, the search, confiscation, report, and segregation -- could deter a person of ordinary firmness from exercising his rights. See Allah, 229 F.3d at 225.

As to causation, Judge Brody concluded that the close timing between Booth's letters to King and Brockenbrough, standing alone, showed that the letters could be regarded as a substantial or motivating factor in the decision to discipline him. See Booth, 346 F. Supp. 2d at 763. Because defendants

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[8] In Rauser, our Court of Appeals set forth the burden-shifting framework that district courts should use to evaluate prisoner retaliation claims, deriving the "substantial or motivating factor" test from Mount Healthy Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977). In Mount Healthy, the Supreme Court used a burden-shifting framework to decide a retaliation case that arose in the public employment context. Rauser injected a degree of deference into the Mount Healthy analysis. The Court decided to allow prison officials to prevail -- even if they lose on causation -- by proving they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest. See Rauser, 241 F.3d at 334. In formulating this deferential standard, the Rauser panel drew on Turner v. Safley, 482 U.S. 78, 89 (1987), in which the Supreme Court held that a prison regulation that impinges on the constitutional rights of an inmate is valid if it is "reasonably related to legitimate penological interests." See Rauser, 241 F.3d at 334.

failed to offer any rebuttal evidence, Judge Brody reasoned, she had to deny their motion as to Booth's retaliation claim. Id.

On the record today, no reasonable jury could conclude that Booth's letters were a substantial or motivating factor in the actions of Worsley, Harris, Terry, Young, Morrison, Stolle, or Shovlin. For an event to induce action, one must know about it. There is no record evidence that any of these defendants knew about Booth's letters. To the contrary, all seven present unrebutted, affirmative evidence that they did not know. See Def.s' MSJ 2, Ex. F, Ex. H, Ex. I, Ex. J, Ex. K, Ex. L, & Ex. M. In short, if these officials were unaware of Booth's protected conduct, that conduct could not have motivated retaliation from them.

We are sensitive to the close timing between Booth's letters to Commissioner King (late December of 2002) and Deputy Warden Brockenbrough (January 6, 2003), and the alleged retaliatory acts (from January 13, 2003 to January 17, 2003). But for timing alone to raise an inference of retaliatory motive, it must be "unusually suggestive." Krouse v. Am. Sterilizer Co., 126 F.3d 494, 504 (3d Cir. 1997).

As a threshold matter, applying this doctrine, which has its genesis in employment law, to prisoner civil rights actions seems problematical. The daily life of a prisoner bears no resemblance to an employee's. If a one-month gap between an inmate's grievance (threatening legal action) and any "adverse" action (e.g., a search, transfer, or solitary confinement) was by

itself sufficient for a retaliation claim to withstand summary judgment, any inmate could do precisely what Booth did -- file grievance after grievance to assure that, if he ever sues for retaliation, he will have enough coincidence handy to present the nearest claim to a jury. In other words, the prisoner could immunize a future retaliation claim from summary judgment simply by filing every month a new grievance that threatens legal action, which is by no means an extravagant hypothesis in this area of the law.

By contrast, in the workplace formal grievances are rare and almost never serial. A worker's making a formal complaint is a notable and extraordinary event during his or her tenure on the job. Such complaints are not routinely addressed to the top officer in the pyramid.

We need not belabor these sharp and obvious differences. The workplace and the cellblock are simply incomparable. It would thus be unwise to swap doctrines from such disparate realms.[9]

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[9] While in Rauser our Court of Appeals noted the suggestive timing between the plaintiff's insistence on his First Amendment rights and his subsequent transfer and wage reduction, it permitted the plaintiff's claim to survive summary judgment only upon finding additional evidence that supported an inference of retaliatory intent. Rauser, 241 F.3d at 334.

In addition to the timing, Rauser swore that a correctional official warned him not to bring a constitutional challenge to a prison policy and threatened that such a challenge would result in a denial of parole. Id. Further, the Department of Corrections acknowledged that it denied a favorable parole recommendation solely because Rauser refused to participate in a drug and alcohol treatment plan that he felt violated his First Amendment rights. Id. Last, Rauser sued the Commissioner of the

Since Booth sued each defendant individually, and because none of them knew about his protected conduct, the timing suggests nothing other than a course of events any reasonable fact-finder would expect in the life of an inmate, events that -- fair or not -- were unrelated to Booth's letters.[10] We shall accordingly enter summary judgment in favor of these seven defendants.

Turning to the two remaining defendants, King and Brockenbrough, in order to hold a defendant liable for a civil rights violation, that defendant "must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); see also Sutton v. Rasheed, 323 F.3d 236, 249 (3d Cir. 2003) (citing Rode for this proposition). Thus, "mere 'linkage in the prison chain of

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Pennsylvania Department of Corrections in his official capacity and the Chairman of the Board of Parole in his official capacity, unlike Booth, who sued twenty officials in their individual capacities.

To the extent that Rauser injects a "timing-plus" test into prisoner civil rights actions, it accounts for the differences between prison and the workplace mentioned in the text.

[10] Even if timing alone is deemed to create an inference of causation here, the same result would obtain. The burden would then shift to defendants to prove by a preponderance of the evidence that they would have made the same decisions absent the protected conduct for reasons reasonably related to a legitimate penological interest. Rauser, 241 F.3d at 333. Because defendants offer unrebutted evidence that they had no idea about Booth's letters, a reasonable jury could only find that, regardless of Booth's letters, the guards would have acted the same.

command' is insufficient to implicate a state commissioner of corrections or a prison superintendent in a § 1983 claim." Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) (quoting Ayers v. Coughlin, 780 F.2d 205, 210 (2d Cir. 1985)). Instead, a plaintiff must demonstrate the defendant's personal involvement, which can be done "through allegations of personal direction or of actual knowledge and acquiescence." Rode, 845 F.2d at 1207.

Here, King and Brockenbrough have sworn that they did not even know about the four retaliatory actions Booth attacks, let alone participate in them. See Def.s' MSJ 2, Ex. N ¶¶ 3-10, Ex. O ¶¶ 3-10. Booth points to no record evidence hinting otherwise. Consequently, we shall also enter summary judgment in these officials' favor.[11]

[11] Booth claims that we lack authority to permit additional summary judgment practice. This argument, too, fails. First and foremost, Judge Brody's earlier Order was "subject to revision at any time" before her or us. See Fed. R. Civ. P. 54(b). Defendants filed a second motion for summary judgment on June 20, 2005, and Judge Brody elected to entertain it or she would have denied it in the following six months. This Court since December 5, 2005 has independent authority to set motion practice as it sees fit, especially when, as here, there is nothing to try.

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ORDER

AND NOW, this 3rd day of February, 2006, upon consideration of defendants' motion for summary judgment (docket entry # 114) and plaintiff's response (docket entry # 117), and for the reasons enunciated in the accompanying memorandum of law, it is hereby ORDERED that:

1. Defendants' motion for summary judgment is GRANTED; and

2. The Clerk shall CLOSE this matter statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.

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JUDGMENT

AND NOW, this 3rd day of February, 2006, the Court having today granted the remaining defendants' motion for summary judgment, it is hereby ORDERED that JUDGMENT IS ENTERED in favor of defendants Leon King, Warren Stolle, Charles Shovlin, Sandra Morrison, Terrence Worsley, Michael Terry, Phyllis Harris, Alice Young, and Rodney Brockenbrough and against plaintiff Timothy Booth.

BY THE COURT:

/s/ Stewart Dalzell, J.